Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

MOUNTAIN WEST HELICOPTERS, LLC,

Petitioner,

v.

TEXTRON, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the purely economic loss doctrine, adopted by the court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), revisited in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997) and followed by a strong majority of jurisdictions, including Idaho, contemplate recovery, in tort, of economic losses suffered by a helicopter owner resulting from a crash caused by the malfunction of a negligently designed and/or manufactured or unreasonably dangerous and defective part under circumstances where, in addition to causing the economic losses claimed, the malfunction implicates the tort concern with safety by also causing serious personal injury and/or damage to property other than to the defective product itself?

2. Does the Court's holding in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997) apply where a defect, located in property added to the original product by a prior user, causes a malfunction that damages or destroys the original product introduced into commerce by the manufacturer. That is, does the *Saratoga Fishing* holding apply in reverse, i.e., when a defect in property added by a prior user (rather than the original product introduced into commerce by the manufacturer) causes a malfunction that subsequently damages or destroys the original product (rather than damaging or destroying property added by a prior user)? Is the resulting damage, nonetheless, damage to "other property" and recoverable in tort?

PARTIES BELOW

a. List of Parties Below

Textron, Inc. ("Textron"), the successor in interest to the Lycoming Division of Avco Corporation and the predecessor in interest to AlliedSignal, Inc. ("AlliedSignal") and Honeywell, Inc., is the only defendant/appellee/respondent remaining herein. All other defendants have been dismissed by stipulation, court order or settlement. References to Textron, herein, include its predecessors and successors in interest.

b. Corporate Disclosure Statement Under Rule 29.6

Mountain West Helicopters has no parent company and no publicly held company owns more than 10% of its stock.

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OPINIONS BELOW

The trial court's order granting Textron's motion for summary judgment is not published. Appendix ("App.") at 5a. The court of appeals' decision is also not published. App. at 1a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment July 11, 2001. It denied a petition for rehearing *en banc* August 8, 2001. App. at 11a. The court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS

No constitutional or statutory provisions apply to the resolution of this dispute. The purely economic loss doctrine is part of federal common law, adopted in admiralty jurisdiction.

> With admiralty jurisdiction comes the application of substantive admiralty law. (Citations omitted). Absent a relevant statute, the general maritime law, as developed by the judiciary applies. (Citations omitted). . . . [T]he general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.

East River, 476 U.S. at 864-865. "A strong majority of courts follow the *East River* [purely economic loss] rule. . . ," Restatement Third, Torts: Products Liability §21, *Comment d* at 298. The trial court found Idaho to be among the "majority," interpreted *East River* to disallow recovery of Mountain West's damages and concluded Idaho would do likewise despite no Idaho decision so holding. The Tenth Circuit affirmed "[f]or substantially the same reasons given by the district court. . . ."

STATEMENT OF THE CASE

a. Nature of the Case

This case, brought by Mountain West as the owner of a

Bell model UH-1L helicopter, is one of two cases asserting damages arising out of a September 18, 1995 crash near Grace, Idaho. The crash resulted from the "failure, by fatigue cracking, of the engine's centrifugal impeller." App. at 6a. Mountain West seeks damages for loss of the helicopter, profits lost under the contract it was performing, increased insurance premiums, and the like. Its employee/pilot, Charles Krause, sued, in Texas, seeking damages for personal injuries[1] suffered in the same crash. Mr. Krause's and Mountain West's cases asserted a right of recovery under product liability theories including strict liability in tort (alleging both design and manufacturing defects and failure to warn), negligence and breach of warranty.

b. Proceedings Below, Including a Statement of the Lower Courts' Jurisdiction

Mountain West sued in state court. Citing 28 U.S.C. §§ 1441(a) and 1446(d), defendants removed to Utah's federal court based on diversity jurisdiction (28 U.S.C. § 1332(a)(1)).

Relying upon the multidistrict litigation statute, 28 U.S.C. § 1407, defendants unsuccessfully moved to consolidate the two cases in Utah. Thereafter, Mr. Krause's personal injury action settled in the summer of 1999. A year later, the district court dismissed Mountain West's claims as prayed in Textron's motion for summary judgment premised upon the purely economic loss doctrine. The court's opinion notes:

> Textron argues that pursuant to Idaho law [Mountain West] cannot recover economic losses in products liability cases. In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476

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[1]Mr. Krause described the extent of his injuries, medical treatment and physical therapy at pages 50 through 62 of his deposition taken in the Texas case. Among other things, he suffered a burst fracture at thoracic vertebrae number 12, with resulting paralysis and loss of bowel, bladder and sexual function. Tenth Circuit App. at 154.

> U.S. 858 (1986), the Supreme Court denied recovery for economic loss in maritime cases holding that: "Since all but the very simplest of machines have component parts, [a contrary] holding would eliminate the distinction between warranty and strict products liability."[2] *Id.* at 867. . . . Idaho, along with many other states, ha[s] extended this ruling holding . . . that claims for economic loss may not be pursued in a tort action. See *Ramerth v. Hart*, 983 P.2d 848 (Idaho, 1999). . . .
>
> . . . [E]conomic loss is not recoverable in these circumstances and therefore Textron's Motion for Summary Judgment is granted. . . .

App. at 7a-8a (footnote supplied). The trial court also concluded, and the court of appeals also affirmed, that "Textron's Motion for Partial Summary Judgment regarding Failure to Warn is now MOOT." App. at 4a and10a.

Mountain West appealed under 28 U.S.C. § 1291. In the trial court Textron argued the law of Idaho applied. At the time of granting Textron's motion, the trial court ruled that Idaho law did apply. On appeal, Mountain West stipulated that Idaho law applied and moved the Tenth Circuit to certify certain questions to the Idaho Supreme Court.

The Tenth Circuit ruled "[f]or substantially the same reasons given by the district court, we agree that Idaho law does not permit Mountain West to recover its . . . damages in tort," affirmed the district court and denied Mountain West's motion to certify. App. at 4a.

c. Statement of Facts

"[O]n summary judgment the inferences to be drawn

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[2]As outlined in section IX(b)(3) below and with all due respect, the language quoted by the trial court is not the *East River* holding.

from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

1. On September 18, 1995, Mountain West's Bell model UH1L helicopter, FAA registration number N70410, (the "Helicopter"), engaged in helicopter logging operations near Grace, Idaho, suddenly lost all power and crashed.

2. The engine lost power due to "failure, by fatigue cracking, of . . . [its] centrifugal impeller." App. at 2a and 6a.

3. The resulting crash destroyed the Helicopter and seriously injured Mountain West's employee/pilot, Mr. Krause.

4. Mountain West purchased the Helicopter, about eight months earlier, from a prior user Scott Paper Company.

5. The Helicopter had a Textron Model T53-L-13B engine, with Serial Number LE18722B (the "Engine").

6. On the day of the crash, the Engine had a centrifugal impeller, part number 1-100-078-07G and serial number M346379 (the "Impeller" or "Centrifugal Impeller").

7. The Impeller was not part of the Helicopter or Engine when the respective manufacturers first introduced each into commerce. It became part of the Engine, on November 26, 1990, as a spare/replacement part, while under repair at the request of a prior user, Scott Paper Company, and was part of the Engine when Mountain West purchased the aircraft in 1995.

8. Textron negligently designed and manufactured the Impeller. It was also unreasonably dangerous and defective, having both design and manufacturing defects the existence of which Textron failed to warn Mountain West of. The design defect consisted of two unnecessary drain (weep) holes, drilled into the Impeller during manufacturing. By eliminating the holes from the Impeller design (which Textron has now done[3]), the manufacturer eliminated the risk of negligently

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[3]See Textron's response to Request for Admission No. 64. Tenth Circuit App. at 62-63.

manufacturing the holes contrary to the design specifications. The manufacturing defect lay in Textron's failure to meet design specifications applicable to this specific Impeller, when it failed to comply with a "63 micro finish smoothness" requirement applicable to the interior surfaces of the holes.

9. Because the holes did not meet the design specification, i.e., the standard of care, the Impeller had a higher propensity to develop cracks at the holes, it actually did develop cracks and when the cracks had grown to lengths that compromised the Impeller's structural integrity it failed, in flight, after only 3,157.4 flight hours of the manufacturer-established Impeller life limit of 25,000 flight hours.

REASONS FOR GRANTING THE WRIT

a. Summary of Reasons for Granting the Writ

Mountain West seeks review in this court, under Rule 10(c) of the Rules of the Supreme Court, because the decision rendered by the trial court and affirmed by the Tenth Circuit decides[4] an important question of federal law that the courts below believed Idaho would follow. The decision conflicts with Idaho Supreme Court cases, cited in section IX(b)(4) below, a prior Tenth Circuit case, *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992), and this court's decisions in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986) and *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997).

Moreover, as noted below, under Rule 10(a) of the Rules of the Supreme Court, the Tenth Circuit ruling is now the subject of a split of authority among the courts of appeals. The Third Circuit has held, and this court affirmed its holding that, "damage . . . to a defective product *is* actionable in tort if the

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[4]Mountain West, with all due respect, suggests the trial court's decision and the court of appeals' affirmation are more accurately described as misinterpretations of an important question of federal law.

defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River* at 862 (emphasis supplied), citing *East River S.S. v. Delaval Turbine*, 752 F.2d 903, 908, 909-910 (3rd Cir. 1985). The Tenth Circuit now holds it is not actionable in tort.

Furthermore, the trial court also concluded, and the Tenth Circuit affirmed, that "Textron's Motion for Partial Summary Judgment regarding Failure to Warn is now MOOT." App. at 10a. The question whether *East River's* purely economic loss rule renders moot or, otherwise, defeats a post-sale failure to warn claim is, as noted in section IX(d)(2), also the subject of an existing conflict among the courts of appeals.

There is much debate over the correct interpretation of the purely economic loss doctrine. The dissent in *Hapka v. Paquin Farms*, 458 N.W.2d 683, 689 (Minn. 1990) notes the doctrine "involves the complex and confusing area of the law where contract and tort overlap" to remedy the same harm. Dean Keeton confirms "[t]he availability of both [tort and contract] . . . liability for precisely the same kind of harm has brought about confusion and unnecessary complexity." Prosser & Keeton on the Law of Torts, § 92 at 655 (5th ed. 1984).

Mountain West submits both the trial court and the Tenth Circuit misapprehend the meaning of the purely economic loss doctrine. It does not prevent recovery when the same defect that implicates the tort concern with safety, by causing personal injury or damage to property other than the defective product itself, also causes economic loss. At best, the doctrine precludes tort recovery only "when a defective product purchased in a commercial transaction malfunctions, injuring *only* the product itself and causing *purely* economic loss." *East River*, 476 U.S. at 859 (emphasis supplied). That was the *only* issue answered in *East River* and "[w]hen a product injures only itself the reasons for imposing a tort duty are weak. . . . The *tort concern with safety* is reduced when an injury is only to the product itself." *East River* at 871 (emphasis supplied).

East River, as noted above, recognizes "damage solely

to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River* at 862 (emphasis supplied), citing and affirming *East River S.S. v. Delaval Turbine*, 752 F.2d 903 (3rd Cir. 1985). It is also the essence of Mountain West's petition.

Dean Keeton recognizes and supports the position Mountain West asserts herein.

> A distinction should be made between the type of "dangerous condition" that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms *only the product* should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage *limited solely to the property*, recovery should be available . . . on a contract-warranty theory.

32 Southwestern Law Journal 1, 5 (1978) (emphasis supplied). Commenting on Dean Keeton's statement, the dissent in *S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn. 1985) notes the "requirement that there be damage to other property or personal injury is simply a shorthand way of determining whether a defect is part of the 'accident problem' against which tort law seeks to protect." *Id.* at 436. Here, the serious personal injuries suffered by Mountain West's employee/pilot establish the "accident problem" or the "unreasonable risk of harm to persons." Moreover, the Impeller malfunction, rendering the Engine powerless and, in the "accident," causing the total loss of the Helicopter and Engine, also evidences the "accident problem" and the "unreasonable

risk of harm to property other than the product itself."

The purely economic loss doctrine, adopted in *East River* and recognized in Idaho, does not reject Mountain West's claims when, without warning, a negligently designed and manufactured or dangerously defective Impeller malfunctions in a sudden and calamitous fashion, and in addition to causing economic loss, "creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes."

b. Mountain West's Recovery Is Consistent with the Purely Economic Loss Doctrine and No Idaho Case Holds Otherwise

1. A Brief History of the Purely Economic Loss Doctrine

The purely economic loss doctrine developed over the last approximately 35 years. Textron, quoting the *East River* holding independent of the context of the much narrower issue addressed and the Third Circuit holding affirmed, contends the doctrine's essence is "whether stated in negligence or strict-liability, no products-liability claim lies . . . when the only injury claimed is economic loss." *East River* at 876. Since Mountain West claims only economic loss, Textron contends and the lower courts agree, Mountain West has no tort claim.

Mountain West, in contrast, contends the doctrine applies "when a defective product purchased in a commercial transaction malfunctions, injuring *only* the product itself and causing *purely* economic loss." *Id.* at 859 (emphasis supplied). Since this malfunctioning Impeller injured more than "only the defective product" and caused more than "purely economic loss," Mountain West claims entitlement to tort damages.

The leading exposition of the doctrine is *East River*.[5] In contrast to this dispute, in *East River* this court addressed the

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[5]At page10 of its brief in the Tenth Circuit, Textron acknowledges *East River* is "the leading case. . . ."

limited issue "whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring *only* the product itself and causing *purely* economic loss." *East River* at 859 (emphasis supplied). Addressing that narrow[6] issue, this court held "a manufacturer . . . has no duty under either . . . negligence or strict products-liability . . . to prevent a product from injuring itself." *East River* at 871. Hence, "whether stated in negligence or strict-liability, no products-liability claim lies . . . when the only injury claimed is economic loss." *Id.* at 876.

Mountain West respectfully suggests the purely economic loss doctrine applies, by definition, when the malfunctioning product causes "purely economic loss." *East River* recognizes "since by definition *no person or other property is damaged*, the resulting loss is purely economic." *East River* at 870 (emphasis supplied). The doctrine does not apply when the malfunction causes more than "purely economic loss." This malfunction also caused serious personal injury and damage, i.e., physical harm, to property other than the Impeller.

While *East River* brought national scrutiny to the purely economic loss issue, the problem pre-dates *East River*. In *Santor v. A.& M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) and *Seely v. White Motor Company*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), the New Jersey and California supreme courts also addressed the purely economic loss issue.

> If the article is defective . . . and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists. . . . If . . . the defect

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[6]Notably, a footnote to the holding reads: "We do not reach the issue whether a tort cause of action can ever be stated . . . when the only damages sought are economic." *Id.* at 871, n.6.

is chargeable to the manufacturer, his must be the responsibility for the . . . damage or injury.

Santor, 207 A.2d at 313. The New Jersey court likewise noted:

> . . . [A]lthough the doctrine [of strict liability in tort] has been applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective, we reiterate . . . that the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved.

Id. at 312. Four months after New Jersey's *Santor* decision, Justice Traynor and the California Supreme Court articulated the following disagreement with the *Santor* rationale.

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held liable for the level of performance of his products . . . unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged . . . with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will

not meet his economic expectations unless the manufacturer agrees that it will.

Seely, 403 P.2d at 151.

More than twenty years later, *East River* evaluated the New Jersey and California approaches to the purely economic loss issue. Noting that *Santor* "held . . . a manufacturer's duty to make nondefective products encompassed injury to the product itself, *whether or not the defect created an unreasonable risk of harm*," 476 U.S. at 868-869 (emphasis supplied), a unanimous Supreme Court rejected *Santor* and "adopt[ed] an approach similar to *Seely*. . . ." *Id.* at 871.

The contrary results reached by the Supreme Courts of New Jersey and California, combined with the limited application, in terms of binding precedent, of a United States Supreme Court admiralty decision, have combined to allow continuing disagreement as to the proper interpretation of the purely economic loss doctrine. Moreover, while Justice Traynor identifies Mountain West as one of the "lucky" plaintiffs victimized by "an accident causing physical injury," neither court below has found Mountain West to be so "lucky." Since this court adopted an approach similar to *Seely*, understanding the issue begins with an understanding of *Seely*.

2. The Leading State Court Case on the Purely Economic Loss Doctrine, *Seely v. White Motor Company*, Would Award Mountain West Damages

Seely v. White Motor Company, 63 Cal.2d 9, 403 P.2d 145 (1965), the leading[7] state case on the doctrine, recognizes Mountain West's claims. In addition to articulating the distinct tort/safety and contract/performance duties a manufacturer

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[7]Restatement Third, Torts: Products Liability § 21 at page 299 identifies *Seely* as "the leading state court case. . . ."

undertakes, as recited above, *Seely* expressly recognizes Mountain West's right to recover, in strict liability, for physical injury to the Helicopter caused by a defect contained therein.

> [Mr. Seely] contends that, even though the law of warranty governs . . . economic relations . . . strict liability in tort should be extended to govern physical injury to [his truck]. . . . *We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason for distinguishing them.* (Citations omitted.) In this case, however, the trial court found . . . no proof that the defect caused the physical damage of the truck.

Seely at 152 (emphasis supplied). Mr. Seely did not recover, in tort, for the damage to his truck, because he failed to prove that a defective condition attributable to the manufacturer, White Motor Company, caused the accident![8] *Spring Motors Distributors v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), commenting on *Seely*, notes "[a]lthough the truck had been damaged, the [California Supreme] court sustained a finding . . . that defendant had not created the defect that caused the damage." 489 A.2d at 669. Under *Seely*, Mountain West recovers, in tort, for the destruction of its Helicopter by proving that Textron is responsible for the defect that caused the crash!

Moreover, Justice Traynor's distinction between "physical injuries caused by defects [that fail] to match a standard of safety defined in terms of conditions that create unreasonable risks of harm," and defects that merely render products unable to satisfy "economic expectations," is the same

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[8] *Seely* describes the defect as a "galloping" condition, i.e., the truck "bounced violently." 403 P.2d at 147. ". . . [The dealer], with guidance from [the manufacturer] . . . made many unsuccessful attempts to correct the galloping." *Id.* The accident, however, was not caused by the "galloping" defect. It occurred because "the brakes did not work." *Id.*

distinction between the manufacturer's tort duty where the product "creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes," and its contract duty when the product merely does not perform or underperforms without creating an unreasonable risk of harm and without such harm materializing. *East River* recognizes the "claim of a nonworking product can [and should] be brought as a . . . warranty action." *East River* at 872.

3. The Leading Purely Economic Loss Decision, *East River Steamship v. Transamerica Delaval*, Would Award Mountain West Damages

In *East River* this court depended heavily on *Seely*, reiterating, with approval, the distinction between the tort and contract duties undertaken by the manufacturer.

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on . . . the nature of the responsibility a manufacturer must undertake in distributing his products.

East River at 871, citing *Seely*, 403 P.2d at 151.

The *Seely* distinction did not give rise to a tort duty in *East River* because the defective turbine did not produce "an accident causing physical injury," did not create "unreasonable risk of harm to persons or property other than the product itself," nor did any such "harm materialize." Rather, when the *East River* "turbine malfunctioned . . . [t]he ship, though lacking its normal power, was able to continue on its journey to Panama and then San Francisco." *East River*, 476 U.S. at 860. The malfunction only caused the turbine to underperform. Without a tort duty "for the level of performance of his products in the

consumer's business," *Seely*, 403 P.2d at 151, the manufacturer has no liability in tort.

In contrast, when a negligently designed and/or manufactured or unreasonably dangerous and defective product, including this Impeller or the *East River* turbine, leads to "physical injuries caused by defects [that fail] to match a standard of safety defined in terms of conditions that create unreasonable risks of harm," tort recovery, including tort recovery for economic loss, is entirely appropriate. "For . . . reasons of safety, the manufacturer's duty of care . . . include[s] protection against property damage." *East River* at 867. However, since the *East River* malfunctioning turbine did not implicate the tort concern with safety, it is, in the *Seely* vernacular, merely an"economic expectations" or inadequate quality case. As the third circuit recognized, *en banc*:

> The nature of the defect in this case appears qualitative, as opposed to safety related. . . . *Unlike the defect in those cases in which tort recovery is allowed for a damaged product*, the defect in this case is not intimately related to the safety of the product, nor is it associated with calamitous events like fire or sudden collision.
>
> . . .[T]he manner in which the damage to the turbine occurred implicates the expectation-bargain policy of warranty law rather than the safety-insurance policy of tort law.
>
> . . . [W]e must consider the type of risk . . . that is inherent in this type of qualitative defect. . . . [T]he defect did not pose a risk of sudden or calamitous injury to persons or property. Instead, the risk created by the defect was that the turbine would operate at a lower capacity. . . . We believe that this type of risk, rather than implicating a manufacturer's obligation to place safe products in the stream of

> commerce, only concerns the charterer's *expectations* as to the commercial suitability of the product. . . . [T]he defective turbine did not pose an unreasonable risk of harm to persons or property, and thus . . . the charterers have failed to state a cause of action in tort.

East River S.S. v. Delaval Turbine, 752 F.2d 903, 909 (3rd Cir. 1985) (emphasis supplied).

This court's *East River* decision unanimously affirmed the Third Circuit's judgment for Delaval acknowledging "[t]he Court of Appeals held that damage solely to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River* at 862 (emphasis supplied). Thus, under *East River*, Mountain West's claims are "actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." Mr. Krause's serious personal injuries and the total loss of Mountain West's Helicopter are the facts establishing Mountain West's right to recover in tort.

4. Mountain West's Claims Are Consistent with Idaho's Purely Economic Loss Doctrine and No Idaho Case Would Deprive Mountain West of its Damages When, in Addition to Causing Economic Loss, the Malfunction of a Defective Product Implicates the Tort Concern with Safety by Also Creating an Unreasonable Risk of Harm to Persons or Property Other than the Product Itself and Harm Materializes

No less than six Idaho decisions, five from its Supreme Court and one from its Court of Appeals, quote, as an accurate

statement of Idaho law, the tort/contract distinction articulated by Justice Traynor, in *Seely*, and reaffirmed by this court, in *East River*.[9] The first case to do so was *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Clark cites Justice Traynor's majority opinion in *Seely* as "[o]ne of the most fully articulated discussions of the considerations underlying this [purely economic loss] rule." *Clark*, 581 P.2d at 792. Moreover, *Clark* confirms "[t]he distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury." *Id.*, citing *Seely*, 403 P.2d at 151. *Clark* also affirms the manufacturer of a defective product "can appropriately be held liable [in tort] for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm." *Id.* And finally, *Clark* recognizes while a consumer "can . . . be fairly charged with the risk that the product will not meet his economic expectations," that same consumer "should not be charged at the will of the manufacturer with bearing the risk of physical injury. . . ." *Id.*

Clark also quotes Dean Prosser, with approval, for the "majority rule" that damages *are* recoverable in tort "when an automobile is wrecked by reason of its own bad brakes" (or a Helicopter is wrecked by reason of its own bad Impeller).

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[9]The Idaho Supreme Court cases quoting Justice Traynor's language include, in order of decision: *Clark v. International Harvester Co.*, 99 Idaho 326, 334, 581 P.2d 784, 792 (1978); *State v. Mitchell Construction Co.*, 108 Idaho 335, 343, 699 P.2d 1349, 1357 (1985); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987); *G&M Farms v. Funk Irrigation Company*, 119 Idaho 514, 536, 808 P.2d 851, 873 (1991); and *Oats v. Nissan Motor Corporation*, 126 Idaho 162, 171, 879 P.2d 1095,1104 (1994). The Court of Appeals decision is *Myers v. A.O. Smith Harvestore Products, Inc.*, 114 Idaho 432, 436, 757 P.2d 695, 699 (Idaho App. 1988).

> Dean Prosser summarized this majority rule with respect to recovery of economic losses . . . in negligence as follows:
>
> > '. . . [L]iability for negligence covers any kind of physical harm, including not only personal injuries, but also *property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes*. . . . But where there is *no accident*, and *no physical damage*, and the only loss is a pecuniary one. . . , the courts have adhered to the rule . . . that purely economic interests are not entitled to protection against mere negligence. . . .' W. Prosser, Handbook on the Law of Torts, § 101 at 665 (4th ed. 1971).

Clark, 581 P.2d at 791. *Clark*, like *East River*, is another "economic expectations/poor performance" case. The defective "push rods in the engine" malfunctioned causing a "loss of power" and rendering "the tractor . . . not able to plow a sufficient number of acres per hour for it to be economically practical to operate." 581 P.2d at 788. No risk to persons or other property was created and no physical harm materialized.

Indeed, all of the Idaho cases applying the purely economic loss doctrine are "economic expectations" cases. Justice Bistline's dissent in *Management Catalysts v. Turbo West Corpac and Piper Aircraft*, 119 Idaho 626, 809 P.2d 487 (1991) notes the "[Idaho] cases have dealt with product failures which simply failed to meet buyers' expectations." The "factor . . . of the potential for calamitous personal injury or property

damage . . . was not present in any of the line of Idaho cases which . . . lead to the denial of economic injury in unintentional tort cases." *Id.* at 492.

The only case cited in the opinions of the courts below, as a basis for the Idaho purely economic loss doctrine, is *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999). *Ramerth* does not even cite or analyze the leading purely economic loss cases, *Seely* and *East River*, much less recognize the tort/contract distinction articulated therein and in the Idaho cases identified above. Moreover, *Ramerth* is simply another economic expectations case. The alleged negligent repair and inspection of an airplane did not involve the malfunction of a defective product, did not cause an accident and did not create an unreasonable risk of harm to persons or property other than the product itself nor did that harm materialize. The damages sought were the costs associated with repeating the repairs, to do them right, "as well as lost 'custom spraying profits' for the period when the airplane was being repaired." *Ramerth* at 850.

Two Idaho cases, *J.M.F. Trucking, Inc. v. Carburetor & Electric of Lewiston, Inc.*, 113 Idaho 797, 748 P.2d 381 (1988) and *G&M Farms v. Funk Irrigation Company*, 119 Idaho 514, 808 P.2d 851 (1991), indicate Idaho would award Mountain West damages. In *J.M.F. Trucking* "forty-one days after purchase . . . , a fire began under the dashboard . . . and [a] truck was destroyed. J.M.F. filed suit against [the manufacturer] Freightliner on warranty, negligence and *strict product liability* theories." *J.M.F. Trucking*, 748 P.2d at 382 (emphasis supplied). The Idaho Supreme Court decision notes the trial court "found that the truck was delivered with defective wiring . . . [and] awarded $71,338.85 (. . . the cost of replacing the truck minus $5000 salvage value). In sum, the trial court held for J.M.F. on warranty and *strict liability* grounds." *Id.* (Emphasis supplied). However, the court noted a deficiency, similar to *Seely*, in "the trial court's failure to rule as to which of several possible causes of the fire was, in fact, the cause." *Id.*

Facing a trial court decision lacking clear findings, i.e.,

the trial court did not find that the manufacturer was responsible for the defect that caused the total loss of the truck, the Idaho Supreme Court reversed and remanded. Nevertheless, it recognized a right to recover damages, in strict liability, when a truck is wrecked by reason of its own bad wiring (or a helicopter is wrecked by reason of its own bad impeller). "A finding of causation is imperative to any ruling holding one strictly liable in products liability, as it must be proved that the defect . . . caused the injury or damage." *Id.* at 383.

G&M Farms recognizes Idaho "held in *Clark* that *unless* there was injury to persons or property as a result of the malfunction of a product, there was no justifiable reason for expanding tort law to cover purely economic losses. . . . [T]he Uniform Commercial Code, and . . . *Clark v. International Harvester*, 99 Idaho 326, 581 P.2d 784 (1978), precludes a products liability action sounding in tort under these circumstances where there is no personal injury or damage to property alleged." *Id.* at 864 (emphasis supplied). In contrast, when the malfunction causes such injury there is justifiable reason for expanding tort law to cover economic losses.

c. The More Recent United States Supreme Court Decision, *Saratoga Fishing Co. v. J.M. Martinac*, Would Award Mountain West Damages

The Restatement Third, Torts: Products Liability §21, *Comment d* at 298 recognizes "[a] strong majority of courts follow the *East River* [purely economic loss] rule . . . and it is likely that these courts will follow *Saratoga* as well."[10] *Saratoga Fishing* recognizes that in order to decide whether a defective product "creates an unreasonable risk of harm to . . . property other than the product itself," one must first decide

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[10]Mountain West knows of no Idaho decision that has yet decided whether Idaho would follow the *Saratoga Fishing* rationale.

what is the "product itself?" Neither court below answered the question but the court of appeals' opinion notes "Mountain West . . . purchased the helicopter, with the engine and centrifugal impeller already installed. . . ." App. at 2a.

The Impeller that was part of the Helicopter and Engine both when Mountain West purchased from Scott Paper and on the day of the crash, was not the same impeller installed in the Engine or the Helicopter originally introduced by the respective manufacturers into the stream of commerce. Nonetheless, the inference to be gathered from the Tenth Circuit's decision is the "product itself" is the Helicopter, including the Engine and defective Impeller. Thus, when the Impeller malfunctioned, destroying the Engine and Helicopter, there was no damage to "property other than the product itself." If this is the Tenth Circuit's decision, then it ruled as the Ninth Circuit did in *Saratoga Fishing Co. v. Marco Seattle Inc.*, 69 F.3d 1432 (9th Cir.1995). This court reversed the Ninth Circuit in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997).

> In *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), the Court held that an admiralty tort plaintiff cannot recover for the physical damage the defective product causes to the "product itself"; but the plaintiff can recover for physical damage the product causes to "other property." . . . This case asks how . . . tort law treats the physical destruction of . . . equipment (a skiff, a fishing net, *spare parts*)[11] added by the initial user after the first sale and then resold as part of the ship. . . . Is that added equipment part of the "product

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[11] Judge Noonan's concurring and dissenting opinion in the court of appeals notes the added property included "the skiff, seine net, fuel, *spare parts* and other miscellaneous equipment sold by [the prior user] to Saratoga Fishing. . . ." 69 F.3d at 1447 (emphasis supplied).

> itself" . . . [o]r is it "other property. . . ?" We conclude that it is "other property. . . ."
>
> The Ninth Circuit . . . noted that the equipment . . . was part of the ship when Madruga resold the ship to Saratoga Fishing, and . . . held the added equipment was part of the defective product that itself caused the harm. . . . [Thus] . . . the majority concluded that Saratoga Fishing could not recover in tort. . . . A dissenting judge believed that the "product itself" was the ship when launched into the stream of commerce by Martinac, its original builder. Consequently, the added equipment was "other property." . . . We now agree with the dissenting judge.

Saratoga Fishing at 876-878 (emphasis and footnote supplied).

> When a manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the "product itself" under *East River*. Items added to the product . . . are therefore "other property," and the Initial User's sale of the product . . . does not change these characterizations.

Id. at 879. The defective Impeller, undisputedly manufactured by Textron and ultimately sold as a spare/replacement part to Scott Paper, is an "item added to the product . . . after the first sale and then resold as part of the [Helicopter or Engine]. . . ."[12]

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[12]The only distinction between the facts of *Saratoga Fishing* and this dispute lies in the location of the defect. The *Saratoga Fishing* defect was found in the original product and this defect was found in the added property. *Saratoga Fishing* applies, nonetheless. Property added to the original product after the manufacturer introduces it into the stream of commerce, by "selling it to an Initial User," is "other property" and vice versa. Neither opinion below disputes this.

Under *Saratoga Fishing*, an item added to the product is "other property" and "[Scott Paper's] sale of the product [to Mountain West] . . . does not change these characterizations." Thus, tort rules permit recovery.

d. The Court Should Clarify the Confusion Created by the Competing Interpretations of *East River's* Purely Economic Loss Doctrine

Two issues cause more than their share of confusion in this "complex and confusing" area of the law. First, the issue whether a defect, the failure of which occurs in a fashion that implicates safety, justifies the recovery of economic losses in tort or whether recovery is limited to those economic losses caused by actual personal injury, e.g., lost income. Second, whether the tort claim arising from a manufacturer's post-sale failure to warn may justify recovery of economic losses.

1. The Confusion Relating to Whether a Business Entity May Recover Economic Losses, in Tort, Without Suffering Personal Injury

In the courts below, Textron contended economic losses are recoverable in tort only to the extent they arise from personal injury. A business entity, such as Mountain West, cannot suffer personal injury, hence, Textron argues, Mountain West may not recover economic losses in tort. Textron cites two[13] reported decisions supporting the argument.

In *S.J. Groves & Sons v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn.1985) a helicopter was badly damaged in an accident that killed the pilot and injured a passenger. The crash was allegedly caused by the fatigue failure of a component in the collective pitch. Once the rotor blades lost their pitch, there was no force acting to keep the helicopter

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[13]Mountain West believes these are the only two such cases.

aloft, and it crashed. See 374 N.W. 2d at 432. A majority of the Minnesota Supreme Court denied recovery for loss of the helicopter noting "damage–to the defective product itself–is not ordinarily recoverable in tort because a product's unsatisfactory performance is the type of problem that warranty law and the U.C.C. were designed to remedy." *S.J. Groves* at 434. Justice Coyne did not participate in the *en banc* decision and Justice Yetka joined in Justice Scott's dissenting opinion contending:

> The majority misinterprets *Superwood*.[14] . . . The question certified[15] to us asks whether "economic losses" arising from the crash of the helicopter can be recovered under strict liability or negligence. I would answer the certified question in the affirmative. A reading of *Superwood* allowing Groves to recover for damage to the helicopter itself in this case is consistent with the clear *majority view*, as well as with our previous statement in *Society of Fine Arts*.[16] Groves should also be allowed to recover for lost profits and loss of use damages resulting from . . . the damage to the helicopter. Such losses resulted from a "*sudden and catastrophic occurrence*" – a *tortious* event – and thus should also be compensable in tort.

S.J. Groves at 435-436 (emphasis and footnotes supplied). Notably, *S.J. Groves* did not interpret the leading purely

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[14] *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981).

[15] *S.J. Groves* "involve[d] a question certified to [the Minnesota Supreme] court by the Federal District Court of Minnesota. . . ." 374 N.W. 2d at 432.

[16] *Minneapolis Society of Fine Arts v. Parker-Klein Assoc. Architects, Inc.*, 354 N.W.2d 816 (Minn. 1984).

economic loss decision since this court had not yet decided *East River*. Moreover, only the dissent quotes from *Seely* noting:

> For most courts adopting *Seely*, the line drawn between contract and tort damages . . . falls between damage resulting merely from deterioration, internal breakage, depreciation, or failure to live up to the expectation and damage which is sudden and calamitous, resulting from a violent or hazardous accident.

S.J. Groves, 374 N.W.2d at 436.

In *Damin Aviation Corp. v. Sikorsky Aircraft*, 705 F.Supp. 170 (S.D.N.Y.1989), a helicopter operated by Damin, consisting of an airframe manufactured by Sikorsky and an engine manufactured by Allison, crashed at Fort Dix, New Jersey causing the death of the copilot, serious injury to the pilot and total loss of the helicopter. The crash occurred after explosive engine failure . . . [took] out the other engine. . . , the tail rotor, drive shaft and the back-up electronic system leaving the helicopter powerless and without controls. *Id.* at 171.

Applying New Jersey law, the United States District Court declined to award Damin the economic losses it sought. *Id.* at 176. However, damages for the loss of the Helicopter were not an issue. "Soon after the crash, Damin's insurer paid Damin $3,495,000 for the loss of the Helicopter. In November of 1984, the insurer for Sikorsky and Allison reimbursed Damin's insurer for the entire amount which entirely covered the purchase of another . . . helicopter. . . [!]" 705 F.Supp. at 171. Contrary to Textron (or its insurers), the insurers for Sikorsky and Allison recognized their insured's liability for dangerous defects. Moreover, *Damin Aviation* not only fails to analyze *Seely* and *East River*, it does note cite them!

In the courts below Mountain West cited two helicopter crash cases supporting its claims to recover economic losses in tort. Remarkably, one of those cases comes from the Tenth Circuit yet the court of appeals' decision makes no attempt to

distinguish, discuss or even cite it. In *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992), a helicopter crash caused the death of the pilot, William Paton, and the total loss of Four Corners' helicopter. The helicopter engine overheated, causing the crash. *Id.* at 1435-36.

Four Corners, seeking economic losses, and Jenny Paton, seeking damages for the wrongful death of her husband/pilot, joined together as plaintiffs to pursue claims against the engine manufacturer, Turbomeca. The trial court awarded damages to both and the Tenth Circuit affirmed noting:

> Turbomeca contends that the district court erred in permitting recovery of economic damages under . . . strict liability. . . .
>
> . . . It claims that because Four Corners is a commercial user which lost the value of its product, Four Corners should be limited to a cause of action under warranty. . . .
>
> Turbomeca cites *East River S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) for the proposition that a commercial plaintiff's damages for economic losses are not recoverable in a strict liability action. . . . Turbomeca contends that Colorado follows the *East River* rationale. . . .
>
> As a federal court sitting in diversity, we are required to apply Colorado law. . . .
>
> In *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975), the Colorado Supreme Court adopted § 402A of the Restatement (Second) of Torts. Section 402A provides that damage to a product itself is

covered under the doctrine of strict liability.[17]

> . . . The instant case does not fall within the purview of the *East River* decision. As the Ninth Circuit has indicated, *East River* holds "that a cause of action for breach of warranty, not a products liability claim, lies for damage to a defective product, *unless damage is caused to persons or property other than the product itself.*" (Citations omitted). This court has similarly discussed *East River*, indicating that "the Supreme Court stated . . . no products liability claim lies in admiralty when a commercial party alleges **injury only to the product itself** resulting in **purely economic loss**." *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 643 (10th Cir.1991). . . . We hold that, under applicable Colorado law, Four Corners *is* entitled to recover under strict liability for loss of the helicopter.

Id. at 1442-44 (footnote and emphasis in *italics* supplied; emphasis in **bold** in original).

In the crash of yet another helicopter, off the coast of Brazil (hence, the application of admiralty law), the United States district court for the district of Connecticut considered these issues twice–first on the initial motion for summary judgment and a second time following the court's order granting

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[17] In "*Shields v. Morton Chemical Co.*, 95 Idaho 674, 518 P.2d 857, 859 (1974) . . . the Idaho Supreme Court [also] adopted the Restatement (Second) of Torts § 402A (1965), imposing strict liability for 'any product in a defective condition unreasonably dangerous to the user or consumer. . . .'" *Fouche v. Chrysler Motors Corporation*, 103 Idaho 249, 646 P.2d 1020, 1021-1022 (1982). "Section 402A establishes the strict liability of sellers of products for physical harm to users or consumers of those products." *Oats v. Nissan Motor Corporation*, 126 Idaho 162, 879 P.2d 1095, 1104 (1994).

a motion to reconsider. *Comind, Companhia de Seguros v. Sikorsky Aircraft Division of United Technologies Corporation*, 116 F.R.D. 397 (D. Conn. 1987) carefully analyzes *East River* and recognizes Mountain West's right to recover in tort. The helicopter, insured by Comind, crashed following the fatigue failure of the "bearing inner race" that held the helicopter's blades in place. The part failure caused the crash, the resulting deaths of 14 persons and the total loss of the helicopter. *Id.* at 400-401. Addressing defendants' motion for summary judgment, on January 14, 1987, the court first ruled:

> In *East River Steamship*, the Court considered whether liability should be imposed . . . in three paradigmatic situations: First, in cases where the defective product malfunctions and inflicts personal injury on a user or third party; second, in cases where the defective product malfunctions and could have inflicted injury on a user or third party but did not (the "near-miss" scenario); and third, where the defective product malfunctions but poses no threat of physical injury to users or third parties (the "disappointed but unharmed" user scenario). The Court held that liability . . . under . . . negligence or products liability could only be imposed in the first paradigm. . . .
>
> . . . [This] Court finds that the accident involving the helicopter at issue here falls within the first category of paradigmatic cases. . . . Because lives were lost in the accident allegedly due to a defect in the bearing inner race, Comind's claim is not . . . an action for economic damages only [or purely economic loss]. The plaintiff's claim arises from the same accident that took the lives of the helicopter's passengers and crew. Accordingly, the plaintiff

is not barred from bringing its tort claims. . . .

The Court therefore denies the defendants' motion for summary judgment. . . .

Comind, 116 F.R.D. at 416-417. After granting defendants' motion to reconsider, the court ruled again on July 14, 1987.

> . . . [D]efendants begin with the argument that *East River Steamship* stands for the proposition that economic injury is never recoverable . . . for tort-based claims, even when the accident giving rise to the claim also took the lives of several human victims. *East River* . . . does not say this. . . . [T]he specifics of the Court's holding are that 'a manufacturer in a commercial relationship has no duty . . . [in] negligence or strict products liability . . . to prevent a product from injuring itself.' (Citations omitted). Rightfully so as an economic obligation to ensure mere satisfactory product performance is best governed by the salutary principles of warranty. However, in the present case, the product not only . . . destroyed itself, but took with it the lives of its passengers and crew. Thus the duty implicated here is the quite different responsibility to manufacture a reasonably safe product, not merely an obligation to ensure . . . that the product functions in the bargained for manner.
>
> . . . [W]hile it is true that situations involving near-misses or disappointed users may not properly give rise to cognizable tort claims . . . , *situations involving personal injury as a result of product defect lie at the very heart of negligence and strict products liability concerns*. Parties injured as a result of this latter type of product disaster are entitled to lay full

> claim to the salutary liability rules embodied in negligence and strict products-liability concepts. . . . Thus, *for cases falling within the range of the personal injury-causing defect scenario, liability may be imposed for personal as well as economic damages where the duty to manufacture reasonably safe products has been breached under either negligence or strict products-liability rationales.* In . . . situations involving . . . life and death, the superior suitability of tort . . . becomes readily apparent.

Id. at 423-424 (emphasis supplied).

2. The Confusion Relating to Whether Economic Loss Is Recoverable under a Claim of Post-Sale Failure to Warn

The Eleventh Circuit has held that *East River's* purely economic loss doctrine does not prevent a claim for post-sale failure to warn. *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 818 (11th Cir.1984). The Third Circuit (and now the Tenth also) has held that it does. See *Sea-Land Service, Inc. v. General Electric Co.*, 134 F.3d 149, 155-56 (3rd Cir.1998). This split of authority caused one trial court to note:

> The Eleventh Circuit correctly perceived . . . that a post-sale duty to warn of defects "goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy." (Citations omitted). . . . [W]hen it comes to post-sale failure to warn, the reasons for imposing a tort duty to warn are strong and those for leaving the party to its contractual remedies are weak. "To hold otherwise would impermissibly allow a manufacturer . . . aware that it has a defective

> product on the market to hide behind its warranty while the buyer unknowingly uses it."

Brown v. Eurocopter S.A., 143 F.Supp.2d 781, 783 (S.D. Texas 2001), citing *Miller Indus.*, 733 F.2d at 818. Both the tort concern with safety and duty to warn of unreasonably dangerous and defective products justify Mountain West's tort claims.

CONCLUSION

Federal courts act as "'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). "'Speculation by a federal court about the meaning of . . . state [law] . . . in the absence of prior state court adjudication is particularly gratuitous when . . . state courts stand willing to address questions of state law on certification from a federal court.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997), quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'CONNOR, J., concurring). Though certification "rests in the sound discretion of the federal court," doing so "helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. at 391. For the reasons stated herein and to achieve a cooperative judicial federalism, Mountain West respectfully seeks the courts order granting its petition and, at minimum, certifying these "complex and confusing" questions of law to the state of Idaho.

Respectfully submitted,

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